

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Assessment and Collection of Regulatory)	RM-11312
Fees for Fiscal Year 2006)	
)	

**REPLY COMMENTS OF
VSNL INTERNATIONAL (US) INC.**

VSNL International (US) Inc., f/k/a VSNL Telecommunications (US) Inc. ("VSNL US"),¹ by its attorneys, hereby replies to the comments filed in response to its petition for rulemaking (the "Petition") in the above-captioned proceeding urging the Commission to reform the current International Bearer Circuit Fee ("IBCF") rules and policies as applied to non-common carrier submarine cable operators.² The Comments demonstrate that the Commission should reform the current IBCF rules and policies so that non-common carrier submarine cable operators do not continue to pay excessive and disproportionately burdensome regulatory fees.

I. COMMENTS FILED IN SUPPORT OF VSNL US'S PETITION PROVIDE JUSTIFICATION FOR REFORMING THE IBCF RULES AND POLICIES AS APPLIED TO NON-COMMON CARRIER SUBMARINE CABLE OPERATORS

The opening comments demonstrate overwhelming support for reforming the Commission's regulatory regime for assessing IBCFs.³ Most of the commenting parties believe that the current regulatory fee system as it applies to non-common carrier submarine cable systems is broken and agree with VSNL US's proposal to establish a separate fee category for

¹ VSNL Telecommunications (US) Inc. changed its name to VSNL International (US) Inc., effective February 28, 2006.

² See Consumer and Governmental Affairs Bureau, Reference Information Center, *Public Notice*, Report No. 2759 (released February 15, 2006).

³ See, e.g., Apollo Comments at 1; FLAG Comments at 10, n.25; Hibernia Comments at 1, Level 3 Comments at 1; SIA Comments at 1.

non-common carrier submarine cable operators.⁴ As VSNL US observed in its Petition, reclassifying non-common carrier submarine cable service as a new fee category would not constitute a dramatic departure from current IBCF rules, which already recognize non-common carrier submarine cable operators as one of three categories of providers subject to the IBCF.⁵

Most commenting parties also support VSNL US's proposal to establish a flat annual fee for each non-common carrier submarine cable systems.⁶ As the Commission has already recognized, and certain commenting parties acknowledge,⁷ a fee system based on submarine cable system authorizations rather than capacity "would be administratively simpler for both the Commission and carriers."⁸

Almost all of the commenting parties agree that the current capacity-based international bearer circuit regulatory fee has several critical shortcomings as applied to non-

⁴ See, e.g., Apollo Comments at 1, 3-4 (noting that "the Commission created an alternative regulatory regime for non-common carrier submarine cable operators, as appropriate to the circumstances, and therefore also should adopt a separate regulatory fee category"); FLAG Comments at 10, n.25; Hibernia Comments at 1.

⁵ Petition at 7. As VSNL US explained in the Petition, the IBCF currently applies to three categories of active international bearer circuits: (i) the circuits used by a facilities-based common carrier in any transmission facility to provide service to an end user or resale carrier, (ii) the circuits provided to a non-common carrier submarine cable operator on an IRU basis or by lease to any customer, including itself or its affiliates, other than an FCC-licensed international common carrier; and (iii) the circuits provided by a non-common carrier satellite operator through sale or lease to any customer, including itself or its affiliates, other than an FCC-licensed international common carrier. Petition at 4-5.

⁶ See, e.g., Apollo Comments at 5-6 (noting that VSNL's proposal to adopt a fee per cable landing system, rather than on a 64 Kbps basis, is consistent with the Commission's recent decisions to deregulate and rely on market forces rather than impose expanded reporting requirements); FLAG Comments at 10, n.25; Hibernia Comments at 7-8 (noting that "a per-system fee would be simpler to administer than the current capacity-based approach and would adequately cover the Commission's administrative and enforcement costs"); Level 3 Comments at 8 (noting that a flat fee is consistent with the Act and "provides simplicity and transparency, resulting in greater compliance without establishment of new regulations").

⁷ See, e.g., Hibernia Comments at 7; Level 3 Comments at 9.

⁸ See Assessment and Collection of Regulatory Fees for Fiscal Year 2004, *Report and Order*, 19 FCC Rcd. 11662, 11672 (¶ 29) ("2004 Report and Order").

common carrier submarine cable systems.⁹ First, the current capacity-based IBCF regime creates a significant disincentive for non-common carrier submarine cable licensees to deploy new or upgrade existing systems, and discourages the development of new and innovative services.¹⁰ The Commission itself previously found that a fee system based on licenses/authorizations “could provide an incentive for carriers to initiate new services and to use new facilities more efficiently.”¹¹

Hibernia explained that the outdated IBCFs are so high that the submarine cable marketplace has become distorted to the point of discouraging the development of new and innovative services (such as international video-on-demand downloads) and the development of high-capacity international data networks.¹² As Level 3 notes, for almost 20 years the Commission has acted forcefully to encourage new technologies and the deployment of advanced, high-capacity systems through deregulatory decision making.¹³ However, the benefits of the Commission’s foresight in encouraging the development of non-common carrier submarine cable systems are being lost through an antiquated regulatory mechanism that has become increasingly punitive for non-common carrier submarine cable regulatory fee payors.¹⁴

⁹ See, e.g., Apollo Comments at 4, 6; FLAG comments at 6-7; Hibernia Comments at 3-6; Level 3 Comments at 3-4, 7, 9.

¹⁰ See, e.g., Apollo Comments at 2 (noting that a significantly reduced fee would encourage innovation and expansion of capacity); FLAG Comments at 6 (noting that a new, high-capacity submarine cable will immediately suffer from a commercial disadvantage in relation to older, lower capacity systems that incur much lower ICBFs even though the new cable costs no more to regulate); Hibernia Comments at 3-4, 6; Level 3 Comments at 1, 7-8 (“[t]o ensure that the IBCF regime does not undermine the beneficial growth of international capacity and competition in the submarine cable market, the Commission must establish a mechanism that balances market realities with the unique regulatory status and benefits provided by non-common carrier submarine cable systems.”).

¹¹ See *2004 Report and Order*, 19 FCC Rcd. 11672 (¶ 29).

¹² Hibernia Comments at 6-7.

¹³ Level 3 Comments at 7.

¹⁴ Level 3 Comments at 10.

Second, as VSNL US noted in its Petition, the current capacity-based IBCF comprises as much as 50 percent of the overall cost of an active 64 KBPS circuit that is part of higher-capacity products,¹⁵ which is grossly disproportionate when compared to the regulatory fees imposed upon other authorization holders¹⁶ and impedes the operator's commercial ability to sell high-capacity products.¹⁷ In stark contrast, Apollo shows that the 2005 regulatory fee imposed on interstate telecommunications service providers ("ITS") is approximately one quarter of one percent of the price of service; the 2005 Wireless Telecommunications Bureau annual regulatory fee is approximately one tenth of one percent of the price of wireless service; the 2005 fee for cable television operators is approximately one tenth of one percent of the price of cable television service; and the 2005 annual regulatory fee for television station licenses is approximately one tenth of one percent of the "price" of television service.¹⁸ Such excessive fees are inappropriate given that the cost of regulating non-common carrier submarine cable licensees does not increase each year, but instead has decreased significantly over time, and is significantly less than the cost of regulating common carrier and satellite circuit providers.¹⁹ Moreover, as FLAG observes, such result is inconsistent with Congress's intention that no

¹⁵ Petition at 13; *see also* Apollo Comments at 6; Hibernia Comments at 4-6 (noting that for a very high-capacity circuit, the IBCF can equal or exceed the price of the capacity itself, thus effectively doubling the cost of the circuit).

¹⁶ *See, e.g.*, Apollo Comments at 6-7; FLAG Comments at 2, 4; Level 3 Comments at 8; SIA Comments at 1 (noting that the current rules do not fairly apportion IBCF burdens among international carriers).

¹⁷ Petition at 13; Apollo Comments at 6; Hibernia Comments at 4-6 (noting that the regulatory fee for the higher capacity circuits, being capacity-based, thus increases much more quickly than the retail price, with the anomalous result that the regulatory fee becomes an increasing percentage of the price as a customer purchases higher-capacity circuits).

¹⁸ Apollo Comments at 6-7.

¹⁹ *See, e.g.*, FLAG Comments at 3-4; Hibernia Comments a 3-5; Level 3 Comments at 6 (noting that the Commission distinguishes between common carrier and non-common carrier submarine cable systems and imposes greater obligations on common carrier systems).

“industry or class of users . . . pay more than their fair share of costs because of industrial growth or success.”²⁰ As Apollo notes, consistent with the fees imposed on other services, the regulatory fee imposed upon non-common carrier submarine cable systems should be low enough that it would have only a *de minimis* impact on the price of submarine cable services.²¹

Third, the current capacity-based IBCF regime prevents non-common carrier submarine cable operators from predicting with any certainty the amount of regulatory fees that will be imposed on circuits leased under individual capacity contracts.²² FLAG explains three reasons for this lack of predictability: (1) it is nearly impossible to identify upon the execution of a circuit lease the party who will be responsible to pay the IBCF in any given year during the lease term; (2) the Commission modifies its schedule of regulatory fees on an annual basis; and (3) under current rules, it may be difficult for the non-common carrier submarine cable licensee to accurately categorize circuits as “active” or “inactive” for purposes of calculating IBCF liability.²³ FLAG also notes that the lack of predictability to account for costs serves as an obstacle to a fully liquid international capacity market.²⁴

Most of the commenting parties also agree that Section 9 of the Act provides the Commission with authority to amend the regulatory fee schedule as it applies to non-common carrier submarine systems, and, in fact, that Section 9(b)(3) of the Act requires the Commission to amend the regulatory fee schedule, where, as is the case here, a rulemaking or change in law has changed the nature of the regulatory services provided to payors of the regulatory fees by the Commission such that the fees do not accurately reflect the Commission’s costs to regulate such

²⁰ FLAG Comments at 4 *citing* H.R. REP. NO. 102-107, at 13 (1991)

²¹ Apollo Comments at 7.

²² *See, e.g.*, FLAG Comments at 5-6; Level 3 Comments at 4.

²³ FLAG Comments at 5-6.

²⁴ FLAG Comments at 5.

payors.²⁵ As FLAG notes, and VSNL US made clear in its Petition, the services provided by the Commission to non-common carrier submarine cable licensees have changed as a result of at least three separate rulemakings and changes in law: (1) the entry into force of the U.S. commitments in basic telecommunications under the World Trade Organization General Agreement on Trade in Services and the Commission's implementation of those commitments in its Foreign Participation Order; (2) Congress's enactment of the Telecommunications Act of 1996 and the Commission's related rulemaking proceedings streamlining the international Section 214 rules; and (3) the Commission's submarine cable streamlining proceeding.²⁶ As a result of these changes, the Commission is required under Section 9(b)(3) of the Act to amend the IBCFs.²⁷ FLAG also cites to other instances where the Commission has deviated from the assessment methodology when the circumstances warrant, such as is the case here.²⁸

II. AT&T'S COMMENTS OVERLOOK THE CRITICAL SHORTCOMINGS INHERENT IN THE CURRENT CAPACITY-BASED IBCF REGIME AS APPLIED TO NON-COMMON CARRIER SUBMARINE CABLE OPERATORS

While AT&T does not dispute that disparities exist in the treatment of common carrier and non-common carrier submarine cable providers,²⁹ its opposition to VSNL US's

²⁵ See, e.g., FLAG Comments at 1-2, 7; Hibernia Comments at 2-3, 8; Level 3 Comments at 6-7 (noting that because there is a quantitative difference in the amount of regulation imposed on non-common carrier as compared to common carrier submarine cable systems, by assessing the same fees on both, the Commission violates Section 159(b)(1), and therefore, must change the fee regime in accordance with Section 159(b)(3)); SIA Comments at 4.

²⁶ See, e.g., Petition at 17; FLAG Comments at 8; SIA Comments at n.7.

²⁷ 47 U.S.C. § 159(b)(3).

²⁸ See FLAG Comments at 8-10 (citing to the Commission's decision to impose IBCFs on non-common carrier satellite providers and the Commission's determination to assess regulatory fees on interexchange carriers and local exchange carriers based on a percentage of gross telecommunications revenue rather than on the number of access lines controlled by the carrier as specified in the Schedule of Regulatory Fees).

²⁹ See, e.g., AT&T Comments at 3, 8 (contending that disparities between the regulation of common carrier and non-common carriers services have been reduced, but never claiming that such disparities do not exist).

proposal is predictable given that it believes it will pay more if such disparities are reasonably reflected in the IBCF rules and policies.³⁰ Moreover, although AT&T agrees that IBCFs should be reduced as much as possible,³¹ it fails to propose any solution to achieve lower fees.

AT&T asserts that Section 9 of the Act does not require each regulatory fee to be calibrated to the precise regulatory costs incurred by each service.³² As was clearly stated in the Petition, VSNL US is not asking the Commission to precisely calibrate the fees on a service-by-service basis in light of the actual costs of the Commission's regulatory activities for that service.³³ Rather, VSNL US is asking the Commission to reform the basis for assessing IBCFs so that such fees will bear a more reasonable relationship to the regulatory costs imposed by non-common carrier submarine cable operators. As VSNL US explained in the Petition, to which the other commenting parties uniformly concur, the current regime imposes a regulatory burden on non-common carrier submarine cable operators that bears no relationship to the level of Commission activities that they generate.³⁴ VSNL US believes that the applicable regulatory fees should reflect a reasonable and realistic comparative assessment of the FCC regulatory resources used by non-common carrier submarine cable operators. The current capacity-based regime does not account for the disparity in regulatory obligations between non-common carrier submarine cable operators and other entities subject to the IBCF. Reclassifying non-common carrier submarine cable operators as a separate IBCF category will ensure that fee obligations

³⁰ See, e.g., AT&T Comments at 4 (reaching the unremarkable conclusion that because of the "zero-sum" fee process mandated by Section 9, wherein any reduction in the revenue requirement and resulting fees for one category of licensees automatically increases the revenue requirement and resulting fees for other categories, "the establishment of a separate fee category for non-common carrier cable operators with reduced international bearer circuit fees would increase these fees for other carriers.")

³¹ AT&T Comments at 12.

³² AT&T Comments at 3.

³³ Petition at 18.

³⁴ Petition at 18.

more accurately reflect the regulatory costs reasonably attributable to non-common carrier submarine cable operators for “enforcement activities, policy and rulemaking activities, user information services, and international services,” as required by Section 9(a)(1) of the Act.³⁵ Moreover, notwithstanding whether the legal or regulatory changes cited above benefited all U.S. carriers and submarine cable operators, as AT&T contends,³⁶ Section 9(b)(3) *requires* the Commission to add, delete, or reclassify services in the schedule of regulatory fees whenever it determines that, due to a rulemaking or change of law, there is no longer a reasonable relationship between a particular regulatory fee and the benefits of the services provided by the Commission to payors of the fee.³⁷

AT&T also suggests that VSNL US’s proposal is intended to favor cable systems owned by single investors over consortium cables.³⁸ However, there are numerous consortium cables that are licensed on a non-common carrier basis.³⁹ AT&T also contends that VSNL US’s proposal does not clarify whether its proposed flat per-system fee structure would apply to all “non-common carrier submarine cable operators” or only to non-facilities-based carrier circuits on non-common carrier cables. It is difficult to make any sense of AT&T’s comment. From our perspective, AT&T seems to be trying to create confusion and uncertainty where there is none. Nevertheless, we want to make it crystal clear that VSNL US’s proposal would apply to all non-common carrier submarine cable operators.

³⁵ 47 U.S.C. § 159(a)(1).

³⁶ AT&T Comments at 7.

³⁷ *See* FLAG Comments at 8.

³⁸ AT&T Comments at 6.

³⁹ *See, e.g.,* China-US Cable, File No. SCL-LIC-19980309-00005, 13 FCC Rcd. 16232; Japan-US Cable, File No. SCL-LIC-19981117-00025, 14 FCC Rcd. 13066; TAT-14 Cable, File No. SCL-LIC-19990303-00004, DA 99-2042, 1999 FCC LEXIS 4942.

Lastly, VSNL US strongly disagrees with AT&T's contention that the existing IBCF regulatory regime is nondiscriminatory and competitively neutral.⁴⁰ As documented in the Petition, and confirmed by other commenting parties, the IBCF paid by non-common carrier submarine cable operators comprises 50 percent or more of the overall cost of an active 64 KBPS circuit that is part of the higher-capacity products, which is grossly disproportionate when compared to the regulatory fees imposed upon other authorization holders.⁴¹

III. CONCLUSION

For the foregoing reasons, VSNL US requests that the Commission adopt the changes proposed in its Petition expeditiously to ensure that non-common carrier submarine cable operators do not continue to pay excessive and disproportionately burdensome regulatory fees.

Respectfully submitted,

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⁴⁰ See, e.g., AT&T Comments at 3, 4, 5, 7, 11, 12.

⁴¹ See, e.g., Apollo Comments at 6-7; FLAG Comments at 2, 4; Level 3 Comments at 8; SIA Comments at 1 (noting that the current rules do not fairly apportion IBCF burdens among international carriers).